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September 17, 1998

VIA OVERNIGHT DELIVERY

Ms. Magalie Roman-Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

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**Re: GST Telecom Inc.'s Opposition to the Direct Case of GTE in CC
Docket 98-79 and GST Telecom Inc.'s Opposition to the Direct Case
of Pacific Bell in CC Docket No. 98-103**

Enclosed please find an original and seven copies of GST Telecom Inc.'s Opposition to the Direct Case of GTE in CC Docket No. 98-79 and an original and six copies of GST Telecom Inc.'s Opposition to the Direct Case of Pacific Bell in CC Docket No. 98-103. Copies of these documents are being submitted under separate cover to the Commission's copy contractor, ITS, and two copies to the Competitive Pricing Division of the Common Carrier Bureau.

Please date stamp and return the additional seventh copy of each filing in the postage paid return envelope. Should you have any questions concerning this filing, please direct them to the undersigned at 360-356-7104.

Sincerely,

Barry Pineles
Regulatory Counsel for GST Telecom Inc.

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
)
GTE Telephone Operating Companies)
GTOC Tariff FCC No. 1)
GTOC Transmittal No. 1148)
_____)

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CC Docket No. 98-79
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**Comments of GST Telecom Inc.
in Opposition to the Direct Case**

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September 18, 1998

In the Matter of)
) CC Docket No. 98-79
GTE Telephone Operating Companies)
GTOC Tariff FCC No. 1)
GTOC Transmittal No. 1148)
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**Comments of GST Telecom Inc.
in Opposition to the Direct Case**

GST Telecom Inc. ("GST"), pursuant to Federal Communications Commission ("FCC") rules and the Order Designating Issues for Investigation ("ODI") in the above-captioned proceeding, files its comments in opposition to the direct case of the GTE Telephone Operating Companies ("GTE"). GST does not believe that GTE has met its burden of proof under § 204 of the Communications Act and, in any event, has not proposed offering an interstate telecommunications service. The FCC should dismiss GTE's tariff filing.

I. GST's Interest in the Proceeding

GST is a facilities-based CLEC certificated by various state regulators to provide exchange service and exchange access service in territories served by GTE, including Hawaii, California, Washington, and Oregon. GST has interconnection agreements with GTE in California, Hawaii, and Washington which require the payment of reciprocal compensation for the termination of GTE-originated traffic on GST's network.¹ In addition, GST also provides

¹ GTE contends that the issues in the ODI have no impact on any reciprocal compensation agreements. GTE Telephone Operating Companies, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Direct Case of GTE at 7 (Filed Sept. 8, 1998) ("GTE Direct Case"). This seems to be correct to the extent that the ODI does not request

(continued...)

exchange service and Internet backbone links to its ISP customers. Therefore, the outcome of this proceeding could have a significant impact on the GST's operations.

II. Procedural Background

On May 15, 1998, GTE filed Transmittal No. 1148, which amended the company's interstate access portion of its FCC Tariff No. 1. The filing sought to establish GTE's DSL Solutions-ADSL Service in California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, Ohio, Oregon, Texas, Virginia, and Washington by the end of 1998. Two weeks later, the FCC suspended GTE's proposed DSL tariff for one day, mandated that GTE keep an accurate accounting of revenue received from this tariff, and opened an investigation of the tariff.² The FCC then issued an ODI on August 20, 1998 in which the Commission set for investigation the issue of whether the GTE tariff for ADSL service was properly tariffed at the federal level and whether a price squeeze is possible if the DSL service is tariffed federally while the unbundled network elements comprising the service are tariffed at the

¹(...continued)

comments on reciprocal compensation. However, a determination by the FCC that ADSL service is an interstate access service (based on its end-to-end communication) would inevitably lead to the conclusion that all Internet traffic is interstate (in direct contradiction of 21 state regulators and federal courts). In turn, this will eliminate the contractual obligations (demanded by GTE and the RBOCs) of GTE to pay reciprocal compensation for terminating traffic on GST's network. On this issue, GST concurs with the position of the Association for Local Telecommunication Services.

² *GTE Telephone Operators GTOC Transmittal No. 1148*, CC Docket No. 98-79, DA 98-1020 (Rel. May 29, 1998).

state level.³ GTE's Direct Case was due on September 8 and replies or oppositions are due September 18.

III. Section 204 and the Burden of Proof

Section 204 of the Communications Act authorizes the FCC to suspend and investigate the validity of any tariff filed with the FCC. That section also permits the FCC to suspend the tariff and then let it go into effect with the proviso that the carrier keep accurate revenue records because the FCC may decide to order refunds.⁴ In any tariff suspension case, the burden of proof rests with the carrier whose tariff has been suspended.⁵ The carrier is required to provide sufficient information to demonstrate the validity of the tariff, i.e., the tariff is just, reasonable and non-discriminatory.⁶ Applying these principles to the instant case, GTE must provide sufficient evidence that Transmittal No. 1148 constitutes the provision of interstate service under Commission precedent. Whatever other issues are at stake in this case need not be decided because GTE has not met this burden of proof.

³ *Order Designating Issues for Investigation, GTOC Transmittal No. 1148*, CC Docket No. 98-79, DA 98-1667, slip op. at ¶ 12 (Rel. Aug. 20, 1998). The FCC rejected requests to investigate whether the tariff filing would allow GTE to avoid its interconnection obligations under the Telecommunications Act. *Id.* at ¶ 18. That issue is being addressed in the *Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-188 (Rel. Aug. 7, 1998).

⁴ 47 U.S.C. § 204(a); *see Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 749-50 (8th Cir. 1998); *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1480-81 (D.C. Cir. 1992).

⁵ *Southwestern Bell Tel. Co. v. FCC*, 10 F.3d 892, 894 (D.C. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994); *Nader v. FCC*, 520 F.2d 182, 198 (D.C. Cir. 1975); *Beehive Tel. Co. FCC Tariff No. 1*, CC Docket No. 97-249, FCC 98-105, Memorandum Opinion and Order, slip op. at ¶ 1 (Rel. June 1, 1998) ("Beehive Order").

⁶ *Beehive Order* at ¶ 21; *General Tel. Co.*, 69 FCC 2d 490 (1978).

IV. GTE has Failed to Meet its Burden of Proof

The ADSL service at issue in this proceeding will, according to GTE, generally be sold to ISPs, but will be available to any customer that seeks to purchase the service.⁷ Customers will not need to make a telephone call; rather the customer will simply click on the Internet icon on the computer and will obtain a direct link to the ISP over the customer's existing telephone line. The benefits of ADSL are the speed of access and the ability of the end-user to utilize a single line for voice communication while using the Internet.⁸ Despite the evident increase in speed, GTE makes no guarantee that a specific access bit rate will be achieved.

The underlying premise to GTE's case is that the communication from the end-user to the Internet and along the Internet constitutes one communication that may be intrastate, interstate, or international and that it is impossible to determine where the communication is going. Therefore, GTE contends that the longstanding FCC inseparability doctrine performance requires federal tariffing.⁹ GTE also claims that the Internet traffic satisfies the 10% rule for federal tariffing of mixed-use special access lines.¹⁰ Finally, GTE asserts further growth and development of the Internet requires federal tariffing.¹¹

⁷ *GTE Direct Case* at 4; *see also* Transmittal No. 1148 at 321.28-.29.

⁸ *Id.* Under conventional Internet access, a residential or business customer that requires the use of the telephone and the Internet must obtain an additional telephone line dedicated to the computer modem.

⁹ *Id.* at 14-19.

¹⁰ *Id.* at 18.

¹¹ *Id.*

GTE arrives at this conclusion by asserting that the vast majority of communications to the Internet are interstate in nature and that it is impossible to distinguish between interstate and intrastate communications. However, GTE presents no evidence to support either contention. The only data that GTE proffers is a list of popular websites and notes that their physical location are in different states. It requires a great leap in logic to equate the popularity of websites to a conclusion that a particular session on the Internet is intrastate or interstate. Until GTE can present adequate data¹² demonstrating that the facilities used in the ADSL service carry interstate communications, GTE has not met its burden of proof.¹³

GTE further contends that the amount of interstate traffic “vastly exceeds the ten percent threshold set for interstate regulation of analogous special access services.”¹⁴ GTE fails to satisfy this test. First, the FCC’s rules for mixed-use special access lines require the customer to verify whether the special access line has more than 10% interstate traffic.¹⁵ GTE has not provided the type of verification¹⁶ from its customers that would support application of this rule.

¹² Cf. Pacific Bell Tel. Co., Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986, CC Docket No. 98-103, Direct Case of Pacific Bell, Attachment B at 4-5 (Filed Sept. 11, 1998) (stating that SBC developed means to measure jurisdictional nature (interstate or intrastate) of Internet usage).

¹³ Cf. *Beehive Order*, slip op. at ¶¶ 13-14 (holding that Beehive failed to meet its burden of proof because cost data did not adequately explain operating expenses).

¹⁴ *GTE Direct Case* at 18.

¹⁵ See *MTS and WATS Market Structure*, Decision and Order, 4 FCC Rcd 5660, 5661 at n.5 (1989).

¹⁶ See *Petition of the New York Telephone Company for a Declaratory Ruling with Respect to the Physically Intrastate Private Line and Special Access Channels Utilized for Sales Agents to Computer New York State Lottery Communications*, 5 FCC Rcd 1080, 1090 (1990).

Second, the FCC's rule was adopted for special access lines.¹⁷ GTE plans to send traffic for ADSL service over public-switched local telephone lines from the end-user to its central office and special access lines are not involved in that transmission.¹⁸

GTE also asserts that federal tariffing is necessary to meet the statutory objectives of the Telecommunications Act -- to promote continued development of the Internet and deployment of advanced telecommunications services.¹⁹ GTE goes on to contend that federal tariffing is necessary because "fragmented regulation is fundamentally antithetical to the dynamic and seamless [sic] development of the Internet."²⁰

Conclusory statements, however, are no substitute for evidence. It is certainly beyond cavil that the Internet has boomed despite the absence of federal tariffs or other FCC regulation of the Internet. The best contradictory evidence is the provision of increasingly high-speed access to the Internet by ILECs, cable operators, CLECs, and wireless companies. Hard statistics also demonstrate that unbridled growth in the Internet has not been affected by the absence of a federal tariff for Internet access. In 1998, the number of Internet users in North

¹⁷ A special access line provides transmission facilities to a customer-designated location ("CDL") or the facilities between the CDL and the serving wire center. GTE Tariff FCC No. 1, § 5.1.1(C); accord *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 524 (D.C. Cir. 1996).

¹⁸ *GTE Direct Case* at 4-5 and Exh. A; accord Transmittal Letter No. 1148 at 321.28-30.

¹⁹ *GTE Direct Case* at 5.

²⁰ *Id.* at 18.

America passed 79 million, an increase of 36 percent in less than 12 months.²¹ Even the FCC has determined that decentralized control has assisted the spiraling growth of the Internet.²² Thus, GTE's assertion of the need for federal regulation to promote the development of the Internet is belied by the events since 1992.²³

In short, GTE has failed to meet its burden of proof. No factual evidence exists supporting GTE's assertion permitting or necessitating the need for the FCC to tariff ADSL as an interstate access service.

V. GTE's ADSL is not Interstate Telecommunications

The overriding principle underlying GTE's case is that ADSL service is an end-to-end communication that constitutes interstate telecommunications. While such proposition may be true for the communication from the central office to the ISP or from the ISP to whichever computer is accessed by the computer user -- and to reiterate, GST does not believe that GTE has proven this point -- it is not true for that part of the service that GTE identifies as ADSL. Fundamentally, GTE fails to recognize that it is tariffing a service used to carry traffic -- not tariffing the traffic itself.

As GTE points out, the purpose of the ADSL service is to provider end-users users high-speed Internet access while still allowing them to converse over their existing

²¹ See <http://www.wfaa.com/corner/980826_web_use.shtml>. (citing Nielsen Media Research survey on Internet use).

²² See B. Esbin, Office of Plans and Policy, Federal Communications Commission, *Internet Over Cable: Defining the Future in Terms of the Past* 11-12 (1998).

²³ See K. Werbach, Office of Plans and Policy, Federal Communications Commission, *Digital Tornado: The Internet and Telecommunications Policy* 21 (1997) (citing statistics demonstrating exponential growth of Internet from 1992 to 1997)

telephone lines. Transmission of both data and voice would occur over the same public-switched line from the end user to the central office. This is the ADSL portion of the service that GTE describes in its Direct Case and tariff transmittal. That portion of the service is totally local in nature. The local loop must be qualified to provide ADSL service. The end-user customer does not require any new or dedicated lines to reach the central office. This is local exchange service²⁴ – the same transmission lines that a local exchange service customer would use to reach GTE's central office for voice communications.

GTE rationalizes the interstate nature of the telecommunications by focusing on the component of ADSL which links the aggregation point to the ISP. Of course, that argument is irrelevant since the service would be available to any customer willing to pay the cost. Moreover, the only part of the service that requires ADSL technology is that from the end-user customer to the central office. ADSL technology generally is not required from the central office to the ISP or from the ISP to the Internet backbone.²⁵ Since ADSL only is used within the local loop, ADSL service must be local in nature.²⁶

²⁴ US West's nearly identical ADSL service (Megabit Subscriber Services) has been tariffed at the state level. *See, e.g.,* US West Communications, Inc., Advanced Communication Services, Oregon Advice No. 1723 (Effective Aug. 5, 1998).

²⁵ *Cf. GTE Direct Case Attachment A* (showing ADSL loop only going from end-user customer to GTE central office).

²⁶ If ADSL technology is used to transmit communications from the serving wire center to the ISP or the ISP to the Internet backbone, those transmissions would have to go over ADSL qualified loops (i.e., they would have to be clear of bridge taps, remote concentrators, and other electronics associated with regular voice communications). However, GTE does not assert that it will be providing these types of loops to the ISPs. In fact, the ISPs could and often do obtain the necessary transport from the central office to its facilities and to the Internet backbone from CLECs, such as GST.

This conclusion is further buttressed by GTE's recognition that states will regulate the pricing for the unbundled network elements that constitute the ADSL service.²⁷ If the individual elements are tariffed at the state level, then the combination of these elements to create ADSL service also should be tariffed at the state level. Acceptance of GTE's argument essentially would dispossess the state commissions of authority once a carrier sought to combine the unbundled elements – an odd result especially considering the vociferousness with which GTE argued and continues to argue that the FCC did not have the authority to regulate the rates of unbundled network elements.

VI. Conclusion

In short, GTE has not sought to tariff ADSL service. Instead, GTE fundamentally has asked the FCC, not to federally tariff ADSL service (since that is simply a technology of transmission) but to determine that Internet traffic itself is interstate in nature and requires federal tariffing. GTE certainly has not provided sufficient evidence to support that conclusion. Nor has GTE met its burden of proof to support federal tariffing of ADSL service. For the reasons already stated, the FCC should reject GTE's effort to federally tariff ADSL service.

Respectfully submitted,



Barry Pineles
Regulatory Counsel for GST Telecom Inc.

²⁷ *Id.* at 23-25.


Certificate of Service

I, Barry Pineles, Regulatory Counsel for GST Telecom Inc. have caused to be mailed on this 17th day of September, 1998, postage prepaid, a true and correct copy of this Comments on and Opposition to GTE's Direct Case in CC Docket No. 98-79 to the following:

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